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No. [redacted] 53

In the Supreme Court of the United States

October Term, 1952

FEDERAL POWER COMMISSION, *petitioner*,

v.

TUSCARORA INDIAN NATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 911

FEDERAL POWER COMMISSION, PETITIONER

v.

TUSCARORA INDIAN NATION

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1. Seeking to belittle the importance of this case, respondent asserts that the elimination of Indian lands from the proposed Niagara project reservoir will not seriously affect its capacity. The brief in opposition states that feasible alternative lands are available and that any contrary view is merely "the Solicitor General's speculation" or the Federal Power Commission's "sheer dicta" (Brief in Opposition, pp. 16–17 and n. 5). To clarify this point, the Commission hereby reaffirms its conclusion based upon the whole record, and the advice of its technical staff, that Indian lands are essential for the construction of a pump-storage reservoir of 60,000 acre-feet capacity, which in

turn is a requisite of a Niagara hydroelectric project having a dependable capacity of 1,800,000 kilowatts and thus utilizing "all of the United States share of the water of the Niagara River permitted to be used by international agreement" (Public Law 85–159).[1] We repeat that if the decision below stands there will definitely be a substantial reduction in the kilowatt capacity of the Niagara hydroelectric project.

As stated in our Petition, pp. 10, 11, removal of the reservoir from Indian lands would cut its storage capacity by half, to 30,000 acre-feet, and reduce the dependable kilowatt capacity of the project by one-sixth, to 1,500,000 kilowatts, a loss of 300,000 kilowatts. The Power Authority has proposed to raise the dikes of the resulting smaller reservoir, thereby attaining a capacity of 45,000 acre-feet. This will introduce technical problems, and the proposed amendment has not yet been passed upon by the Commission. In any event, even if approved, the proposed modified reservoir would still result in a loss of 150,000 kilowatt capacity from the project contemplated by Congress.

2. Respondent also asserts that the plans of the Power Authority for the Niagara project were never made part of the published record of any committee of Congress, implying that Congress was unaware of the details of the project (Brief in Opposition p. 19, n. 8). This is not so. The House and Senate Com-

[1] We have already pointed out that, when Congress directed full utilization of the Niagara waters, it clearly contemplated a project having a dependable capacity of 1,800,000 kilowatts (Pet. 15–16, and n. 5).

mittee reports refer explicitly to such plans (Pet. 16, n. 5). Furthermore, as the record below shows, copies of the 26th Annual Report of the Power Authority were mailed to the Senate Committee on Public Works and to the House Committee on Public Works on January 28, 1957 (T. 7004–7007, 8249). This report set forth the enlarged project including the pump-storage reservoir proposed after destruction of the Schoellkoff plant (Pet. 15). Additional copies of the 26th Annual Report of the Power Authority were furnished to members of the Subcommittee of the Senate Committee on Public Works during its hearings in April of 1957 on bills dealing with the Niagara development, S. 512 and S. 1037, 85th Cong., 1st Sess. (T. 7000). In response to a question by the Chairman of the Senate Subcommittee, a map on pages 40 and 41 of the 26th Annual Report showing the general location of the project works, including the pump-storage reservoir, was called to the attention of the Subcommittee (T. 7004). Each member of the Senate Subcommittee present at the hearing had a copy of this report and questions were asked with respect to it (T. 7001–7002, 7020). It was because of this background that the Second Circuit held that Congress must have contemplated the taking of Tuscarora lands and that, consequently, Public Law 85–159 constituted authority for condemning them independent of the Federal Power Act. *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d 885, 891–892 (C.A. 2), certiorari

denied, 358 U.S. 841, motion for leave to file petition for rehearing pending, No. 384, October Term, 1958.[2]

For the reasons stated in the petition, and in this reply brief, we respectfully submit that the petition for a writ of certiorari should be granted.

J. LEE RANKIN,
Solicitor General.

WILLARD W. GATCHELL,
General Counsel,
Federal Power Commission.

JUNE 1959.

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[2] Respondent argues that the court below correctly held the term "reservation" in Section 4(e) of the Federal Power Act to include lands owned in fee by an Indian nation, notwithstanding the absence of any real property interest in the United States. It hedges this position somewhat with the statement that the Tuscarora lands in suit were originally purchased by the United States with tribal funds held in trust by the United States (Brief in Opposition, p. 22, n. 10). However, the record will show, as the Second Circuit has stated, that the Tuscaroras acquired the lands "by purchase and not as a grant from the United States", with the assistance only of "the good offices of the Secretary of War." *Tuscarora Nation of Indians* v. *Power Authority*, 257 F. 2d at 887.

U S GOVERNMENT PRINTING OFFICE 1959